Supreme Court, U.S.
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NO. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARK A. METZGER,
Petitioner,

VS.

DAVID J. WEST, FULBRIGHT & JAWORSKI, WILLIAM R. PAKALKA, NANCY LOCKE and WILLIAM J DELMORE, III,
Respondents.

Petition For a Writ of Certiorari To The
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question One

1. DID JUDGE DAVID WEST ACT IN THE ABSENCE OF ALL JURISDICTION?

Question Two

2. WAS DELMORE ENTITLED TO PROSECUTORIAL IMMUNITY WHERE HE KNOWINGLY PROSECUTED A VOID CONTEMPT CHARGE?

Question Three

3. WERE FULBRIGHT & JAWORSKI, WILLIAM PAKALKA, AND NANCY LOCKE ENTITLED TO DISMISSAL OF METZGER'S CIVIL RIGHTS CLAIMS ON THE BASIS THAT THEIR CONSPIRACY TO DEPRIVE METZGER OF COUNSEL WAS UNSUCCESSFUL?

Question Four

4. DID RESPONDENTS' CONTINUING CONSPIRACY TO DEPRIVE METZGER OF EFFECTIVE ASSISTANCE FROM HIS COUNSEL OF CHOICE ENTITLE METZGER TO INJUNCTIVE OR DECLARATORY RELIEF?

Question Five

5. DID THE FEDERAL DISTRICT COURT HAVE JURISDICTION OVER METZGER'S ACTION WHICH AROSE OUT OF A DOMESTIC RELATIONS DISPUTE?

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Petition For a Writ of Certiorari To The
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PETITION FOR WRIT OF CERTIORARI

Petitioner, Mark A. Metzger, files this Petition for Writ of Certiorari requesting that this Honorable Court review the Judgment of the United States Court of Appeals for the Fifth Circuit affirming the

Decision of the United States District Court for the Southern District of Texas dismissing Petitioner's civil rights claim under 42 U.S.C. § 1983 and denying Petitioner's Motion to Remand his claims to State Court.

OPINIONS BELOW

A copy of the Decision of the United States Court of Appeals for the Fifth Circuit affirming the Decision of the United States District Court for the Southern District of Texas is attached as Appendix A. A copy of Order of the United States District Court for the Southern District of Texas Dismissing Petitioner's Civil Rights Claims, Denying Petitioner's Motion to Remand, and Granting Attorney's Fees to Respondents, West and Delmore, is attached as Appendix B. A copy of the Memorandum Opinion issued by the United States District Court for the Southern District of Texas in support of its Order is attached as Appendix C. A copy of the Decision of the Texas Court of Appeals Granting a Writ Prohibiting Judge West from taking any further action until Metzger's Motion to Recuse is ruled on is attached as Appendix D. A copy of the Decision of the State District Judge Arthur Lesher dismissing the Contempt Charges Against Metzger's Counsel, Bradt is attached as Appendix E. A copy of the corrected Decision of the Texas Court of Appeals reversing Judge West's Sanctions Against Metzger, Bradt and Izen is attached as Appendix F.

JURISDICTION

This is a civil appeal from a Decision of a United States District Court entered on October 25, 1994. The United States Court of Appeals for the Fifth Circuit affirmed the District Court's dismissal of the Petitioner's civil rights claims and denial of Petitioner's Motion to Remand, and refused to review the award of attorney's fees to Respondents West and Delmore. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The District Court held that it had jurisdiction over Petitioner's civil rights claims pursuant to 28 U.S.C. § 1343. Appeal was properly taken by Petitioner to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1291.

Petitioner sued for conspiracy to violate civil rights and for injunctive and declaratory relief under 42 U.S.C. § 1983.

Respondents removed Petitioner's State Civil Rights suit under 28 U.S.C. § 1441(c).

The District Court awarded attorney's fees to Respondents West and Delmore under 42 U.S.C. Section §1988.

Petitioner Metzger claims that Respondent West, the State Court Judge, acted in absence of all jurisdiction when he violated Rule 18a of the Tex. R. Civ. Proc.

SUMMARY OF THE CASE

Can a State Judge ever act in the absence of all jurisdiction? Decisions of this Court say a State Court Judge is liable for civil rights damages when he does so. Does a State Judge act in absence of all jurisdiction when he violates the terms of a rule of procedure stripping him of jurisdiction of the case before him? The United States Court of Appeals for the Fifth Circuit says no.

The Court of Appeals ignored the clear reading of Rule 18a of the Texas State Court Rules which Judge West violated when he signed a contempt Show Cause Order directed against Petitioner's State Court attorney, L. T. Bradt, holding that West had only acted in "excess of" his jurisdiction rather than "in the absence of all jurisdiction."

The facts were never in dispute. The State Court Judge (West) violated Rule 18a(d) when he signed the Show Cause Order after Bradt had filed a Motion to Recuse and before the Motion was heard. The following language in the Texas State Court Rules:

> "Except for good cause stated in the order in which further action is taken, the Judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion." Rule 18a(d) Tex. Rules. of Civ. Proc.

stripped West of all jurisdiction to act. Under the clear wording of the Texas Rules, West had no jurisdiction, at that point, to act in excess of.

Respondent Delmore, who acted as Bradt's Prosecutor, knew or should have known that West had no authority to sign or issue the Show Cause Contempt Order under which Bradt was prosecuted. The Court of Appeals ruled that Delmore was insulated by prosecutorial immunity even if he knowingly prosecuted Bradt on void charges. The Court of Appeals held, without any supporting authority, that prosecution of citizens on a void charging instrument, was the "functional duty" of Delmore as an advocate of the State.

The Court of Appeals claimed that Respondents, Fulbright & Jaworski, William R. Pakalka, and Nancy Locke, could not be held liable for their conspiratorial acts which sought to deprive Metzger of the legal services of his counsel of choice, L. T. Bradt, by prosecuting Bradt on void contempt charges, and by incarcerating Bradt, since the prosecution was not successful and did not result in incarceration.

Petitioner's request for injunctive relief was denied on the basis that "nothing in the record" suggested a threat of repeated injury in the future.

Both the Court of Appeals and the District Court refused to remand Petitioner's claims to the State Court even though they had clearly arisen out of a domestic relations dispute. Appendix A, P. 4a.

The Court of Appeals refused to review the District Court's award of attorney's fees under 42 U.S.C. § 1988. The Court of Appeals claims this action is proper since a "specific amount had not been determined." Appendix A, P. 10a.

STATEMENT OF FACTS

During the course of a divorce proceeding, Metzger's wife and divorce attorney charged Metzger with sexual abuse of his son, Larry. Although they were successful in obtaining an indictment, the case fell apart for lack of competent evidence, and the indictment was dismissed. Metzger then filed suit in Federal Court against numerous parties responsible for bringing the charges. Metzger's initial Petition alleged that the numerous Defendants "...had conspired to extort an unfair property settlement, take his children away from him, and maliciously prosecute him for child abuse." Appendix A, P. 2a. The Court of Appeals Opinion incorrectly claims that "Metzger was represented in that action by attorneys, L. T. Bradt ("BRADT") and Joe Alfred Izen, Jr. ("IZEN")."

The Federal District Court did decline to exercise jurisdiction over the case based on the domestic relations exception to federal jurisdiction. In the face of this abstention, Metzger refiled his claims in the State District Court of Harris County, Texas The case was assigned to State Judge David West After initially denying Motions for Summary Judgment filed by several Defendants, West presided over a trial which included six weeks of testimony. At the conclusion of Metzger's case, West granted a directed verdict in favor of all of the Defendants and entered sanctions under Rule 13 Tex. R. Civ. Proc. against Metzger, Bradt, and Izen in the amount of $994,000.00 for "filing a frivolous suit." Appendix A, P. 2a.

Subsequently, the Texas Court of Appeals reversed and rendered the sanctions against Izen and reversed and remanded the sanc-

tions against Metzger. The State Court of Appeals affirmed West's directed verdict. Appendix F, P. 32a.

Prior to the trial, West admitted numerous exhibits, including Metzger's medical records and lie detector test, without objection. During the trial West held Bradt in contempt of Court for repeatedly referring to this already-admitted evidence in the presence of the jury. Appendix A, P. 29a.[1]

After the trial, Bradt and Metzger filed Motions to Recuse West under Rule 18a, Tex. Rules of Civ. Proc. West refused to recuse himself and requested the Presiding State Administrative Judge to assign the recusal motion to another "disinterested Judge" for hearing. While the recusal motion was still pending, and before any hearing on the motion, West signed an Order directing Bradt to appear before another Judge to show cause why he should not be cited for contempt for referring before the jury to already admitted evidence. Appendix A, P. 3a.

Bradt proceeded to trial on the contempt charges and won complete exoneration when the State Judge entertaining the motion, Arthur Lesher, ruled that the contempt charges were void and dismissed the State's case.[2] During the course of the contempt proceeding, Bradt inadvertently picked up a file belonging to the Prosecutor Delmore. The file contained secret communications between the State Judge West and Nancy Locke of Fulbright & Jaworski, in which Locke purported to advise West on the proper means to proceed against Bradt for purposes of contempt and incarceration. Appendix C at P. 19a.

1.The Court of Appeals incorrectly states, in its Opinion, that this evidence was "excluded." The evidence was admitted before trial and was part of the record at the time West made his contempt findings. See Appendix E, P. 29a.

2. Once again, the Court of Appeals Opinion misstates facts. Judge Lesher reached the merits of the contempt charges which West had purported to bring against Bradt and held that the Show Cause Order which West signed had been issued without jurisdiction in violation of Rule 18a, Texas Rules of Civil Procedure. The State lost because West acted in absence of all jurisdiction; not, as the Court of Appeals seems to suggest, because the State "elected to abandon the contempt charges."

After investigating further, Metzger brought suit under 42 U.S.C. §

1983 against all of Respondents for conspiracy to deprive him of the services of his counsel of choice. Metzger attached the original ex parte communication to his State Court Petition which he filed in the District Court of Fort Bend County, Texas. Appendix C, at P. 19a.

Respondents filed Notice of Removal under 28 U.S.C. § 1441(c). Metzger filed a Motion to Remand relying on the Domestic Relations exception to federal jurisdiction. Appendix A, P. 9a.

The District Court denied Metzger's Motion to Remand and granted the Respondents' Motions to Dismiss for Failure to State a Claim, Absolute Immunity, and Prosecutorial Immunity. The District Court also awarded attorney's fees to Respondents West and Delmore.

The Court of Appeals affirmed the District Court's dismissal on all grounds but refused to consider the award of attorney's fees holding such review premature.

If the Fifth Circuit's view of what constitutes actions of a Judge "...taken in absence of all jurisdiction..." is correct, then a State Judge may never be liable for damages under the Civil Rights Act. In making such holding, the Fifth Circuit ignored this Court's admonition that the determination of whether the State Judge has acted in absence of jurisdiction, must be determined in light of the State law which defines his jurisdiction.

The Court of Appeals also creates an exception to liability under the Civil Rights laws which shields conspirators whose schemes are ultimately unsuccessful and thereby promotes, rather than inhibits, violations of fundamental civil rights such as access to counsel of choice and effective assistance of counsel.

Last of all and most troubling, the Court of Appeals Opinion seems to encourage, rather than discourage, clearly illegal conduct on the part of Judges, Prosecutors, and Attorneys whose conduct should be beyond ethical reproach rather than "in pari delicto."

STATEMENT OF THE CASE

QUESTION ONE

1. DID JUDGE DAVID WEST ACT IN THE ABSENCE OF ALL JURISDICTION?

The Court of Appeals adopts an interpretation of judicial immunity which would, indeed, allow State Judges to "...roll around like loose cannons..." in a manner condemned by the dissent in *Stump v. Sparkman*, 435 U.S. 349 (1978) 98 S.Ct. 1099. The Court of Appeals effectively held that a Judge "who has his robes on" can not act in absence of all jurisdiction even when he acts when forbidden to do so by State Law. If Rule 18a, Tex. Rules of Civ. Proc., which has the force and effect of a statute, can not prescribe West's jurisdiction, then what can? None of the cases cited by the Court of Appeals in its Opinion support such a construction or sustain such a result. *Sparkman*, supra. *Bradley v. Fisher*, 13 Wall. 335, 351 (1871). *Pierson v. Ray*, 87 S.Ct. 1213 (1967).

The power to "broadly construe (judicial immunity) in this context" does not carry with it the judicial authority to disregard State statutes limiting jurisdiction. In *Sparkman*, supra, the State Judge who sterilized the unfortunate before him had the jurisdiction to pass sentence. In *Bradley*, the Court had jurisdiction to proceed against the attorneys who practiced before it. No case, from this Court, or any other federal tribunal, supports a ruling that when a Judge acts in a case, when the law strips him of the power to do so, his act is not taken "...in absence of all jurisdiction...."

Where, as here, a Judge violates the terms of his statutory jurisdiction granted him by the State, the issue of whether he commits such violations "maliciously or corruptly" is relevant only to the issue of damages.

By violating the stated terms of Rule 18a, the State Judge West acted when the law specifically prohibited him from acting. He became no different than the State Probate Judge described in *Bradley* who purports to try a murder case when State law has not granted him jurisdiction.

The District Court heavily relied on *Forrester v. White*, 108 S.Ct. 538, 484 U.S. 219, 98 L.Ed.2d 555 in holding West judicially immune from Metzger's claims. Tat case, on careful analysis, lends no support to the Court of Appeals or District Court's rationale. First, the majority of this Court admonished those who would read its teachings on judicial immunity that —

> "Absolute immunity, however, is 'strong medicine, justified only when the danger of [officials' being] deflect [ed] from the effective performance of their duties] is very great.' The danger here is not great enough."

Forrester at P. 545. Here, unlike *Forrester*, holding Judge West liable would have the salutary result of enforcing a State's statutorily-enacted limits on its own Court's jurisdiction. Failure to hold West liable, on the other hand, would encourage Judges to act where State law precludes them from doing so, without fear of retribution. While *Forrester* dealt mostly with acts on the other side of the ledger — actions which were not judicial under the "functional approach," — its few teachings which are applicable here — i.e. that Federal Courts must be cautious in extending absolute immunity — was blithely ignored by the lower Courts.

Cases will continue to reach this Court which struggle to define the concept of judicial acts "...taken in absence of all jurisdiction...." *Mann v. Conlin*, 22 F.3d 100 (6th Cir. 1994). *Mireles v. Waco*, 112 S.Ct. 286 (1991), reversing *Waco v. Baltad*, 934 F.2d 214 (9th Cir. 1991). Neither *Mireles, Mann*, nor any other decision sustaining a claim to judicial immunity, did so where, as here, State law stripped the State Judge of all authority or jurisdiction to act before he committed the violations complained of.

The Court of Appeals' attempt to dismiss West's actions as mere "commission of great procedural errors" is flawed. If, as the Court of Appeals suggests, judicial immunity can be broad enough to insulate a Judge from acting where State law prohibits him from acting, then the "exception" of judicial immunity previously enacted by this Court, and carefully cultivated for over a century has now become an absolute bar to liability and the "exception" has been destroyed.

As a parting shot, the Court of Appeals attempts to save its flawed rationales by claiming that West's issuance of a Show Cause Order was taken in "...post-judgment matters in the underlying action...." which Rule 18a, Tex. Rules of Civ. Proc., did not prescribe. In making this argument the Court of Appeals violated contrary State precedent. The State Court of Appeals granted Metzger Mandamus relief against West which prohibited West from taking any further action — it would not have done so if the Fifth Circuit's interpretation of Rule 18a was correct. See *Metzger v. Casseb*, 839 S.W. S.W.2d 160 (Tex. App. [1st Dist. Houston] 1992) [original proceeding]. The Federal Court of Appeals is bound by the State Court of Appeals' interpretation of its own law.

Judge West acted in absence of all jurisdiction and the Decisions of the District Court and the Court of Appeals dismissing Metzger's claims against Judge West must be reversed.

QUESTION TWO

2. WAS DELMORE ENTITLED TO PROSECUTORIAL IMMUNITY WHERE HE KNOWINGLY PROSECUTED A VOID CONTEMPT CHARGE?

The Court of Appeals sustained the District Court's dismissal of Metzger's claims against the Respondent Delmore with the admonition that his acts were — "Functionally an integral part of the judicial process...." *Imbler v. [sic] Patchman*, 96 S.Ct. 984, 995 (1976), Ap-

pendix A, at P. 6a.

If the Court of Appeals is correct, then Delmore had a duty to prosecute Bradt knowingly on a void charge. This can not be so. Here, unlike *Imbler*, West had no jurisdiction to bring Bradt before the Court. All of the decisions relied on by the Court of Appeals assume a valid charging instrument or one which, if defective, is based on valid personal and subject matter jurisdiction The State District Judge trying the contempt case against Bradt, Arthur Lesher, dismissed the contempt action Bradt based on the non-existence of jurisdiction He found that West's signature on the Show Cause Order was void under Rule 18a, Texas Rules of Civil Procedure, and there was, therefore, no charging instrument. Appendix E, P. 30a.

Delmore admitted that he prepared the void instrument and presented it to Judge West for his signature. Delmore never claimed he was unaware that West lacked jurisdiction. Delmore's adoption of West's argument that West's signature on the Show Cause Order was an action taken in a "...entirely separate and independent suit..." is similarly flawed.

Knowing prosecution of a "void" charge should defeat any claim of prosecutorial immunity. Such immunity can not exist where the Prosecutor has no authority to prosecute. *Snell v. Tunnel*, 920 F.2d 673, 694 (10th Cir. 1990) cert. denied. 119 S.Ct. 1622 (1991). The Court of Appeals claimed there was no basis in law to support Metzger's argument. Unless this Court determines that knowing prosecution of a void charge by a Prosecutor, is part of his traditional function, the Court of Appeals Opinion affirming the District Court's dismissal of Metzger's claims against Delmore must be reversed.

QUESTION THREE

3. WERE FULBRIGHT & JAWORSKI, WILLIAM PAKALKA, AND NANCY LOCKE ENTITLED TO DISMISSAL OF METZGER'S CIVIL RIGHTS CLAIMS ON THE BASIS THAT THEIR CONSPIRACY TO DEPRIVE METZGER OF COUNSEL WAS UNSUCCESSFUL?

The Court of Appeals admits that the Respondents, Fulbright & Jaworski, Pakalka, and Locke were not protected by any immunity of their co-conspirators. *Wyatt v. Cole*, 112 S.Ct. 1827, 1832 (1992). The Fifth Circuit went on to hold that Metzger's Civil Rights Petition failed to state a claim upon which relief could be granted because the conspiracy was unsuccessful.

In reaching this conclusion, the Court of Appeals conceded, as it had to, that the Civil Rights Act protected Metzger from acts taken by Respondents under color of law. The Fourteenth and Fifth Amendments guarantee Metzger's right to counsel of choice in civil matters *Texas Catastrophe Property Ins. Ass'n. v. Morales*, 975 S.2d 1178, 1181 (5th Cir. 1992), cert. denied.,113 S.Ct. 1815 (1993). The Court of Appeals also agreed that conspiracy claims are viable under 42 U.S.C. §1983. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990). Appendix A at P. 7a.

The Court of Appeals' conclusion that a conspiracy must succeed in its aims before the victim has a cognizable claim is a curious result. The Fifth Circuit seems to hold that private parties violating Metzger's civil rights can not liable here unless they actually incarcerated Bradt. The effort to jail Bradt was alleged, in Metzger's Petition, to be but one part of a total overall plot to separate Metzger from Bradt's representation. The mere fact that Bradt or Izen persevered in representing Metzger despite the best conspiratorial efforts of the Respondents, which included judicial threats, and over $900,000.00 in illegal sanctions, does not establish that Metzger "suffered no damages." Any unlawful conspiratorial actions taken against Metzger's counsel, which rendered such counsel ineffective or affected his case

performance in any manner, violated Metzger's right to effective assistance of counsel from his counsel of choice. The question of whether Bradt's performance was affected by the Respondents' actions is a factual one which can not be appropriately resolved on a Motion to Dismiss.

The private Respondents, Fulbright & Jaworski, Locke, and Pakalka, were not entitled to any immunity. These Respondents' conspiracy included ex parte communications with Respondent West for the purpose of carrying out a mutual plan, in secret, to prosecute and incarcerate Bradt on void contempt charges. The private Respondents were not entitled to any form of immunity and are liable to Metzger for deprivation of Metzger's right to effective assistance of counsel from the counsel of his choice under the Fourteenth and Fifth Amendments.

The Court of Appeals Decision affirming the District Court's dismissal of Metzger's claims against Respondents Fulbright & Jaworski, Pakalka, and Locke, should be reversed.

QUESTION FOUR

4. DID THE FEDERAL DISTRICT COURT HAVE JURISDICTION OVER METZGER'S ACTION WHICH AROSE OUT OF A DOMESTIC RELATIONS DISPUTE?

The District Court denied Metzger's Motion to Remand despite the fact that the conspiracy directed against Petitioner and his counsel, Bradt, arose out of issues entangled with Metzger's divorce proceeding. The District Court conceded that the prior Federal Judge, Honorable Norman Black, abstained from exercising Federal jurisdiction over civil rights claims arising out of false charges of child abuse on which Metzger had been indicted during Metzger's divorce proceeding.

The Court of Appeals refused to interpret *Ankenbrandt v. Richards*, 111 S.Ct. 2206 (1992) as grounds supporting remand. The District Court held that a Federal District Court —

> "...May not abstain under the doctrine of domestic relations when the complaint does not request the District Court to issue a divorce, alimony, or child custody decree...."Appendix C, P. 18a.

This analysis of Ankenbrandt ignores the fact that Respondents West, Locke, and Fulbright & Jaworski (joined by all the other Defendants in the State Court) removed the entire case which included, at the time of removal, pending and unresolved custody claims between Metzger and his former wife, Judy (Metzger) Sebek.

As of the date of the filing of this Petition, the District Court had not even remanded those custody claims, or other divorce matters, to the State District Court though admonished to do so by the Court of Appeals. Appendix A, P. 11a, Note 7. Metzger's claim for protection of his civil rights was but one more cause of action of many arising out of the State Court divorce litigation.

While conceding that the civil rights case refiled by Metzger, after Black's federal dismissal, was on appeal, the Trial Court apparently failed to heed the principle that federal abstention must take into consideration the —

> "...Possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state...." *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978)

Metzger's Fort Bend County divorce proceedings, the contempt action against Bradt, and the Prohibition proceeding before the First Court of Appeals, are inextricably linked together by the same facts.

No stronger case for abstention, under *Crouch's* concerns to

avoid incompatible rulings, could be made.

Likewise, the State Court interpretation of Rule 18a of the Tex. Rules of Civ. Proc., and its effect on Metzger's claims, is another ground strongly supporting abstention and remand. The Court of Appeals and District Court should have granted deference to the State Court's interpretation of that Rule instead of ignoring it.

The Court of Appeals and the District Court erred in denying Metzger's Motion to Remand.

QUESTION FIVE

5. DID RESPONDENTS' CONTINUING CONSPIRACY TO DEPRIVE METZGER OF EFFECTIVE ASSISTANCE FROM HIS COUNSEL OF CHOICE ENTITLE METZGER TO INJUNCTIVE OR DECLARATORY RELIEF?

The District Court originally held that Metzger could not obtain equitable relief under the facts of this case since the Claimant —

> "...Must allege and prove that he lacks an adequate remedy at law..."

Appendix C at P. 23a. The Texas First Court of Appeals disagreed with the District Court's conclusion. Metzger obtained Mandamus and Prohibition relief against West prohibiting him from taking any further action on October 16, 1992.

Undeterred, Delmore, West, and their cohorts, continued to prosecute Bradt illegally until their conspiracy came to an abrupt end with Judge Lesher's dismissal of the contempt proceedings on December 4, 1992.

Since West, acting in conjunction with Delmore, did not obey the Mandamus or Writ of Prohibition issued by the Texas Court of

Appeals, it is hard to imagine how Metzger had "an adequate remedy at law" which, by any conceivable means could strip him of his right to injunctive relief under the Civil Rights Act. The District Court's premise that —

> "The two cases in which Metzger alleges improper conduct are still pending final resolution and all issues in dispute can be raised in the courts in which those actions are pending...."

was erroneous Appendix C, P. 23a . One of the actions (the contempt action) terminated in Bradt's favor on December 4, 1992.

The quartet of individuals and the law firm carrying out this conspiracy committed unlawful acts which are capable of repetition. Metzger faces the likelihood of continued commission of official misconduct which will result in injury and which threatens injury. His right to injunctive relief under these circumstances could not be more clear. *City of Los Angeles v. Lyons*, 103 S.Ct. 1660 (1983). Surely, Metzger's claims for relief, under the above facts, and in light of the existing State Court rulings, could not be fairly disposed of on a Motion to Dismiss. The Court of Appeals' affirmance of the District Court's Decision dismissing Metzger's claims for injunctive and declaratory relief should be reversed.

QUESTION SIX

6. COULD THE DISTRICT COURT AWARD ATTORNEY'S FEES AGAINST METZGER UNDER 42 U.S.C. 1988 UNDER THE FACTS OF THIS CASE?

The Court of Appeals refused to review the District Court's imposition of attorney's fees against Metzger under 42 U.S.C. §1988 on the basis of ripeness. The Fifth Circuit cited its own precedent which holds that a Decision awarding attorney's fees is not ripe for review until the District Court awards a specific amount. ***Williams v. Ezell,***

531 F.2d 1261, 1263 (5th Cir. 1976).

Taking into account the Respondents' handwritten confession of wrongdoing, the ex parte communication attached to Metzger's State Court Complaint, and this Court's admonition in that —

> "...This Court has never undertaken to articulate a precise and general definition of a class of acts entitled to immunity...." *Forrester* at P. 644 —

the grant of attorney's fees against Metzger under the 42 U.S.C. §1988 which requires filing of "frivolous, unreasonable, or groundless" litigation, can not be sustained.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. There is considerable confusion in the Circuits as to what actions of a State Court Judge constitute acts "...taken in clear absence of all jurisdiction..." for purposes of determining judicial immunity.

2. The Fifth Circuit held that Civil Rights Claims arising out of domestic relations disputes should not be remanded under *Ankenbrandt v. Richards*, 111 S.Ct. 2206, 2215 (1992). This Decision, unless reversed, will result in a flood of removals of State divorce litigation to the Federal Courts.

3. The Fifth Circuit held that participants in Civil Rights conspiracies which are partially unsuccessful in their goals may not be sued under the Civil Rights Act. This Decision, if left unreversed, will encourage, rather than discourage, conspiracies to violate civil rights.

CONCLUSION

For all of the above reasons stated herein, this Petition for Writ of Certiorari should be granted and the Court of Appeals Opinion affirming the District Court's dismissal of Metzger's Civil Rights Claims, denial of Metzger's Motion to Remand, and award of attorney's fees under 42 U.S.C.§1988 should be reversed.

Respectfully submitted,

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APPENDIX D

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 93-2744
Summary Calendar*

MARK A. METZGER,
Plaintiff-Appellant,

versus

JUDY METZGER SEBEK, ET AL.,
Defendants,
DAVID J. WEST, ET AL.,
Defendants, Appellees

Appeal from the United States District Court for the Southern District of Texas

(CAH 92 3216)

Before GARWOOD, BARKSDALE and DEMOSS, Circuit Judges.
GARWOOD, Circuit Judge:

Plaintiff-appellant Mark A. Metzger (Metzger) brought this suit pursuant to 42 U.S.C. § 1983 alleging a conspiracy to deprive him of his right to counsel of choice. He appeals the district court's order granting all defendants' motions for dismissal for failure to state a claim on which relief may be granted. We find no error and therefore affirm.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS AND PROCEEDINGS BELOW

The present appeal has a convoluted history that begins with Metzger's divorce several years ago. Metzger sought to modify the divorce court's custody order to increase his visitation rights with his children. During the course of that proceeding, allegations of child sexual abuse were raised against Metzger.

Metzger subsequently brought an action in federal district court against various participants in the state custody action, including his ex-wife, Judy Metzger Sebek, her attorneys, Baylor College of Medicine, Harris County Protective Services, and various child psychologists. Seeking relief under 42 U.S.C. § 1983, Metzger alleged that the defendants had conspired to extort him into an unfair property settlement, take his children away from him, and maliciously prosecute him for child abuse. Metzger was represented in that action by attorneys L.T. Bradt (Bradt) and Joe Alfred Izen, Jr. (Izen).

The federal district court declined to exercise jurisdiction in the case, however, based on the domestic relations exception to federal jurisdiction. Metzger then refiled essentially the same suit in the 269th District Court of Harris County Texas. The case came to trial before Judge David West (Judge West). After six weeks of testimony, Judge West granted a directed verdict in favor of all the defendants. He also sanctioned Metzger, Bradt, and Izen in the amount of $994,000 for filing a frivolous lawsuit. The verdict and sanctions are currently on appeal in the Texas state courts.

During the trial, Judge West held attorney Bradt in contempt of court for repeatedly referring to previously excluded evidence in the presence of the jury. A hearing on those charges was postponed until after the conclusion of the principal suit, and Bradt was released on his own recognizance pending such hearing. He was not then, nor has he

ever been, jailed in connection with the contempt charges.

Following the directed verdict, Metzger filed a motion seeking to recuse Judge West from handling any post-judgment matters in the case. Judge West refused to recuse himself and assigned the recusal motion to a disinterested judge for resolution. While the recusal motion was still pending Judge West signed an order directing Bradt to appear before a disinterested judge to show cause why he should not be cited for contempt in connection with his actions during the trial. After two days of testimony, the State elected to abandon the contempt charges, and the judge dismissed the case.

The current suit arises from the contempt charges and proceedings instituted against Bradt (who is not a party to the current suit) in state court. Metzger claims that Judge West's action in drafting the show cause order while the motion to recuse was still pending was taken in the absence of all jurisdiction and was therefore void. Moreover, Metzger claims that Judge West conspired, in violation of 42 U.S.C. § 1983, with Nancy J. Locke, William R. Pakalka, and the law firm of Fulbright & Jaworski (collectively the Fulbright defendants)[1] in drafting the allegedly void show cause order[2].He further alleges that the Harris County Assistant District Attorney assigned to prosecute the contempt charges, William J. Delmore, III (Delmore), became part of the conspiracy when he prosecuted on the basis of a show cause order that Delmore knew or should have known was issued by a judge without authority to do so. Metzger contends that the object of this alleged conspiracy was to deprive him of his right to counsel of choice during the pendency of his appeal on the state court conspiracy claims.

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1 The Fullbright defendants represented Baylor College of Medicine in the state court conspiracy action.

2 Metger's evidence of the conspiracy between Judge West and the Fulbright defendants comes in the form of a note written by Nancy Locke to Judge West. Bradt evidently came across the note while perusing a prosecution file that he had picked up (allegedly by inadvertence) during the contempt hearing.

He sought monetary damages, equitable relief, and court costs.[3]

This action was originally filed in the state district court of Fort Bend County, Texas, under the same cause number as Metzger's divorce action.[4] Defendants filed notice of removal pursuant to 28 U.S.C. § 1441(c). Metzger sought to remand, asserting that the domestic relations exception precluded federal jurisdiction and that the prior federal court's determination that the exception applied constituted the law of the case. The district court held that the domestic relations exception and the law of the case doctrine were inapplicable to the claims before it and denied the motion to remand.

Concurrently, all defendants moved to dismiss the charges against them for failure to state a claim. In addition, Judge West and Delmore moved for dismissal on the basis of absolute immunity. The district court granted all defendants' motions, denied Metzger's claims for injunctive relief, and awarded attorneys' fees to Judge West and Delmore. Metzger now appeals the district court's decision.

DISCUSSION

I. Motions to Dismiss for Failure to State a Claim

A. Standard of Review

Under Rule 12(b)(6), a district court may, on motion, dismiss on the pleadings if they do not state a claim on which relief may be granted. FED. R. CIV. P. 12(b)6). our review of the district court's decision to dismiss is *de novo. Jackson v. City of Beaumont Police Dep't,* 958 F.2d 616, 618 (5th Cir. 1992).

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3 By agreement of the parties, other defendants originally sued in this case were dismissed without prejudice.

4 The divorce action has been transferred from Harris County.

In reviewing the propriety of dismissal, the allegations of the plaintiff's complaint must be taken as true. *McCormack v. National Collegiate Athletic Asstn,* 845 F.2d 1338, 1343 (5th Cir. 1988). Wholly conclusory allegations of conspiracy, however, are insufficient to withstand a motion to dismiss; specifically, to state a cause of action for conspiracy under 42 U.S.C. § 1983, the plaintiff must allege specific, material facts tending to show a conspiracy. *Hale v. Harney,* 786 F.2d 688, 690 (5th Cir. 1986). Dismissal is proper if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *McCormack,* 845 F.2d at 1343 (footnote and citation omitted).

B. Judicial Immunity

It is clear that Judge West acted under the protection of his absolute judicial immunity in this case and therefore could not be subject to a civil suit for damages. We therefore affirm the district court's order granting Judge West's motion to dismiss under Rule 12(b)(6).

Judges enjoy absolute immunity from civil suits for damages for their judicial acts, "'even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.'" *Stump v. Sparkman,* 98 S.Ct. 1099, 1104 (1978) (quoting *Bradley v. Fisher,* 13 Wall. 335, 351 (1872)) (footnote omitted); *see also Johnson v. Kegans,* 870 F.2d 992, 995 (5th. Cir..) *cert. denied,* 109 S.Ct. 3250 (1989). The doctrine applies to suits for damages brought under 42 U.S.C. § 1983. *Stump,* 98 S.Ct. at 1104 (citing *Pierson v. Ray,* 87 S.Ct. 1213 (1967)). Jurisdiction is to be broadly construed in this context, and a judge loses his immunity only if he acts in the clear absence of all jurisdiction.

Metzger contends that Judge West lost his immunity because he violated Texas law. [5]

[5] Under Texas Rule of Civil Procedure 18a, a motion to recuse deprives the affected judge of authority to act further, unless good cause is shown, until the motion is decided. *See Lamberti v. Tschoepe,* 776 S.W.2d 651, 652 (Tex. App.- Dallas 1989,writ denied).

We find Metzger's argument in this regard contrived. The Supreme Court has clearly rejected such reasoning: "A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." *Id.* at 1106. Judicial immunity insulates the judge from suit even when he acts in excess of his jurisdiction. That immunity is broad enough to cover whatever errors may have been committed in this case.

Moreover, the show cause order was related to a contempt proceeding that had absolutely nothing to do with the merits of Metzger's case. *See* TEX. R. CIV. P. 18a(d) ("Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action *in the case* after filing of the motion [to recuse] and prior to a hearing on the motion.") (emphasis added). Any lack of jurisdiction in the ability to decide post-judgment matters in the underlying action did not affect Judge West's jurisdiction to pursue contempt charges arising from the trial of that case.

C. Prosecutorial Immunity

It is similarly well settled that a prosecutor is absolutely immune from damage suits under section 1983 for acts that are functionally "an 'integral part of the judicial process.'" *Imbler v. Patchman,* 96 S.Ct. 984, 995 (1976) (citation omitted). Initiating a prosecution and presenting the state's case are quintessential prosecutorial acts. *Id.* Bad motives do not abrogate the prosecutor's immunity. *Morrison v. City of Baton Rouge* 761 F.2d 242, 248 (5th Cir. 1985); *see Imbler,* 96 S.Ct. at 993-94 (creating an exception to prosecutorial immunity for malicious or dishonest acts "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system" (footnote omitted)).

Metzger's arguments to the contrary are patently meritless. Metzger asks this Court to hold that the prosecution of a "void" charging instrument strips the prosecutor of absolute immunity. There being no basis in law for this argument, we reject it. As noted above, the test

of prosecutorial immunity is a functional one. The acts of which Metzger complains all clearly come within the ambit of Delmore's duties as an advocate for the state.

D. Liability of the Private Defendants

Metzger is correct in pointing out that a party who conspires to deprive another of his constitutionally protected rights is not protected by any immunity his coconspirators may enjoy. *Wyatt v. Cole,* 112 S.Ct. 1827, 1832 (1992.). This observation is of little help to him, however, since his pleadings fail to establish that the Fulbright defendants violated section 1983. .

Section 1983 protects citizens from acts taken under color of law that intentionally deprive them of their rights under federal law. The Fourteenth Amendment does guarantee a right, although not an absolute one, to counsel of choice in civil matters. *Texas Catastrophe Property Insurance Ass'n v. Morales,* 975 F.2d 1178, 1181 (5th Cir. 1992), *cert. denied,* 113 S.Ct. 1815 (1993). In addition, we have recognized that conspiracy claims are viable under section 1983. *Pfannstiel v. City of Marion,* 918 F.2d 1178, 1187 (5th Cir. 1990). It is clearly the law of this Circuit, however, that a conspiracy alone is not enough to state a cause of action under section 1983; Metzger must also show that the conspiracy caused an *actual deprivation* of his constitutional right to counsel of choice. *Id.*

This Metzger has utterly failed to do. Nothing in the pleadings shows that Metzger- at any time or in any proceeding- was ever deprived of Bradt's services as a result of the contempt charges. Bradt was never jailed in connection with the contempt charges; those charges have since been dismissed. Bradt continues to represent Metzger in his currently pending appeal from Judge West's directed verdict. Metzger was also represented in that case by Izen, who continues to represent him there and in this action. In short, Metzger has not shown that the alleged conspiracy to deprive him of Bradt's services caused an actual

deprivation of his right to counsel of choice.[6] Since the pleadings reveal no set of facts that would entitle Metzger to relief, the district court was correct in granting the Fulbright defendants' motion to dismiss.

E. Claims for Injunctive Relief

Metzger's claims for injunctive relief are similarly unavailing. Even if we assume *arguendo* that Metzger's remedy at law is inadequate, he "must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future" to be entitled to an injunction. *Society of Separationists, Inc. v. Herman,* 959 F.2d 1283, 1285 (5th Cir.), *cert. denied,* 113 S.Ct. 191 (1992). There is nothing in the record to suggest that such a threat exists; "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief.'" *City of Los Angeles v. Lyons,* 103 S.Ct. 1660, 1665 (1983) (citation omitted). It therefore was not error to dismiss Metzger's claim for injunctive relief.

II. Motion to Remand

As noted above, Metzger filed this lawsuit under the same cause number as his divorce proceeding. Therefore, when the defendants removed the case on the basis of the section 1983 claims against them, the unrelated state law divorce matters were also transferred to federal court. Metzger argues that the district court should have remanded the case pursuant to the domestic relations exception to federal jurisdiction. Alternatively, he asserts that the previous decision by a federal court to abstain under that exception in another matter in which Metzger

[5]Metzger contends that the "unlawful prosecution of void charges" is a constitutional harm that sustains his cause of action under section 1983. However apt the characterization, the harm of which Metzger complains occurred, if at all, to Bradt. Metzger has no standing to assert a claim based on injury to his lawyer. *Thomas v. N.A. Chase Manhattan Bank,* 994 F.2d 236. 242 (5th Cir. 1993). Indeed, we find it curious that Metzger advances this argument. He has strenuously argued, in opposition to the district court's determination that he lacked standing to challenge the charges brought against Bradt, that he has standing based on the denial of his right to counsel of choice. But he was not denied that right.

was involved constitutes the law of the case and therefore precluded the district court from exercising jurisdiction in this matter.

Neither of these arguments is persuasive. The domestic relations exception to federal jurisdiction has been narrowly construed. *Ankenbrandt v. Richards,* 112 S.Ct. 2206, 2215 (1992); *Rykers v. Alford,* 832, F.2d 895, 900 (5th Cir. 1987). The district court was not called on to resolve any issues of divorce, alimony, or child custody. *Ankenbrandt,* 112 S.Ct. at 2215. The fact that matters of this nature were included under the same cause number is irrelevant. A case must be removed in its entirety; only then can the district court exercise its discretion to remand those claims in which state law predominates.[7] 28 U.S.C. § 1441(c).

The law of the case doctrine is similarly inapplicable. Law of the case protects the integrity of legal determinations made in a single lawsuit. *DFW Metro Line Services v. Southwestern Bell Telephone Corp.,* 988 F.2d 601, 604 (5th Cir.), *cert. denied,* 114 S.Ct. 183 (1993). It has no application *between* cases. The prior case and this case both included section 1983 conspiracy claims, but there the similarity ends. None of the current defendants was a party to the prior lawsuit .[8] The resolution of this case turns on completely separate issues. There was no error in refusing the motion to remand.

III. Attorneys' Fees

The district court awarded attorneys' fees to both Judge West and Delmore pursuant to 42 U.S.C. § 1988 but has not yet determined the specific amount to be awarded. Claims based on the award of attorneys' fees are collateral to the merits of the case and not part of the final judgment. *Budinich v. Becton Dickinson and Co.,* 108 S.Ct. 1717,

[7]We fully expect that the district court will in due course remand those aspects of the case in which state law predominates.

[8]The only party common to both suits, Judy Metzger Sebekb was voluntarily dismissed from this suit.

1720-21 (1988); *Deus v. Allstate Insurance Co.*, 15 F.3d 506, 521 (5th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3065 (U.S. July 5, 1994) (No. 94-32). An award of attorneys' fees is not final until a specific amount has been determined. *Williams v. Ezell*, 531 F.2d 1261, (5th Cir. 1976). Any claim based on these awards is therefore premature and is not now before us.

CONCLUSION

For the foregoing reasons, the judgment of the district court IS AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN THE MATTER OF THE MARRIAGE OF MARK A. METZGER AND JUDY METZGER AND IN THE INTEREST OF MARK A. METZGER, III, RUSSELL LAWRENCE METZGER, AND JEAN DANIELLE METZGER
Minor Children

MARK A. METZGER
Plaintiff,

VS .

JUDY (METZGER) SEBEK, DAVID J. WEST, NANCY LOCKE, HENNESSY & ZITO, MARY BENTON, FULBRIGHT & JAWORSKI, WILLIAM R. PAKALKA, HUDGINS, HUDGINS & WARRICK, SHERYL FIKE, WILLIAM J. DELMORE, III AND LORETTA KORZEB
Defendants.

CIVIL ACTION NO. H-92-3216

In accordance with the memorandum of even date it is

ORDERED that the plaintiff's motion to remand is hereby DENIED. It is further

ORDERED that the motions to dismiss of the Honorable David J. West, William J. Delmore, Fulbright & Jaworski, William R. Pakalka and Nancy J. Locke are hereby **GRANTED.** It is further

ORDERED that Plaintiff of Civil Rights and Injunctive Relief be **DISMISSED.** It is further

ORDERED that defendant Delmore and West submit affidavits and other supporting documentation to fix the amount of attorney's fees to be awarded. The defendants must file such affidavits within ten days of their receipt of this order. Failure to timely file the necessary documents will be construed as a waiver of the request for attorney's fees. Plaintiff Metzger will then have five days from the filing of the attorney's fees to respond. A failure of plaintiff to respond will be taken as a representation of "no opposition."

It is so ORDERED.

SIGNED at Houston, Texas, this 31 day of August 1993.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IN THE MATTER OF THE MARRIAGE OF MARK A. METZGER AND JUDY METZGER AND IN THE INTEREST OF MARK A. METZGER, III, RUSSELL LAWRENCE METZGER, AND JEAN DANIELLE METZGER
Minor Children

MARK A. METZGER
Plaintiff,

vs .

JUDY (METZGER) SEBEK, DAVID J. WEST, NANCY LOCKE, HENNESSY & ZITO, MARY BENTON, FULBRIGHT & JAWORSKI, WILLIAM R. PAKALUKA, HUDGINS, HUDGINS & WARRICK, SHERYL FIKE, WILLIAM J. DELMORE, III AND LORETTA KORZEB
Defendants.

CIVIL ACTION NO. H-92-3216

MEMORANDUM

Pending before the Court is a Motion to Remand (Instrument No. 17) filed by plaintiff Mark A. Metzger ("Plaintiff" or "Metzger"). Also pending before the Court are Motions to Dismiss for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure:

(1) Motion to Dismiss (Instrument No. 15) filed by Fulbright & Jaworski, William R. Pakalka and Nancy Locke (collectively the "Fulbright

defendants");

(2) Motion for Judgment on the Pleadings (Instrument No. 30) filed by William J. Delmore, III, which will be construed as a motion to dismiss; and

(3) Motion to Dismiss (Instrument No. 35) filed by the Honorable David J. West ("Judge West").

Judge West, Delmore and the Fulbright defendants also petitioned for attorneys' fees pursuant to 42 U.S.C. § 1988. Having considered the motions, the responses, and the applicable law, this Court is of the opinion that the motion to remand will be denied, the motions to dismiss will be granted and that attorney fees will be awarded to the named defendants.

I. STATEMENT OF FACTS

A. Procedural History

This action was filed on September 22, 1992 in the 328th District Court of Fort Bend County, Texas, Cause No. 67944. Although this action is premised on a conspiracy to violate, and the actual violation of Metzger's civil rights it was filed under the same cause number as his divorce proceedings. On October 19, 1992, this action was removed to this Court by the Fulbright defendants pursuant to 28 U.S.C. § 1446(b). All other named defendants joined the removal. On December 14, 1992 Magistrate Judge Stacy signed an Agreed order whereby Judy Sebek, Hennessy & Zito, Mary Benton, Hudgins, Hudgins & Warrick, Sheryl Fike and Loretta Korzeb were dismissed without prejudice. The remaining defendants, Judge West, Delmore and the Fulbright defendants have moved this Court to dismiss the plaintiff's claims.

B. Factual History

In 1989, Metzger moved to modify the parent-child relationship agreement entered into as a result of his divorce action with Judy

Sebek. Metzger claimed he entered into the divorce agreement under duress and alleged conspiracy on the part of Sebek and her attorneys. The Honorable Norman Black, United States District Judge, abstained from exercising jurisdiction over the case. In 1990, Metzger filed a separate conspiracy action in state court; the case was assigned to the Honorable David West, 269th Judicial District Court, Harris County, Texas. After a full trial on the matter Judge West granted a directed verdict in favor Sebek and other parties to that suit on May 21, 1992, and sanctioned Metzger and his attorney, L.T. Bradt, $994,000.00 for bringing a frivolous lawsuit. Metzger is presently appealing that portion of Judge West's decision.

On April 10, and April 28, 1992, during the course of the trial, but before the directed verdict was granted, Metzger's attorney, L.T. Bradt ("Bradt"), was held in contempt by Judge West for violating a court order that certain matters not be communicated to the jury. On June 16, 1992, after trial, Metzger, Bradt, Joe Alfred Izen, Jr. ("Izen") another attorney representing Metzger, filed a motion to recuse Judge West. The motion to recuse was founded on allegations of impropriety on the part of Judge West during the conspiracy trial. Judge West refused to recuse himself and referred the matter to Judge Stovall. Metzger further alleges that despite the filing of the motion to recuse, Judge West without jurisdiction, signed a show cause order directed at L.T. Bradt.

Metzger alleges several conspiracy and civil rights violations on the part of Judge West, Delmorev, and the Fulbright defendants. Metzger seeks damages and a permanent injunction. The defendants removed the case to federal district court.

II. DISCUSSION

A. Federal Court Jurisdiction

On October 26, 1992, Metzger timely filed a motion to remand. He asserts that this case must be remanded to state court pursuant to the

domestic relations exception to federal court jurisdiction. He also asserts that removal to federal court conflicts with the "law of the case" established by Judge Black in the previously filed case involving Metzger's constitutional claims.

1. Domestic Relations Exception

The domestic relations exception has long been recognized. *Ex parte Burrus*, 136 U.S. 586 (1901). Federal courts have historically abstained from "suits for divorce and alimony, child custody actions, disputes over visitation rights, suits to establish paternity and to obtain child support, and actions to enforce separation or divorce decrees still subject to state court modification." *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978). At the same time, the domestic relations exception is not to be read expansively. "[A] case should not be dismissed merely because the parties are from the same family and a domestic dispute forms part of the context of the litigation." *Rykers v. Alford*, 832 F.2d 895, 900 (5th Cir. 1987); see also *McIntyre v. McIntyre*, 771 F.2d 1316, 1319 (9th Cir. 1985); *Franks v. Smith*, 717 F.2d 183, 185 (5th Cir. 1983). The proper inquiry for the court in considering the domestic relations exception is "the type of determination that the federal court must make in order to resolve the case." *Rykers*, 832 F.2d at 900.

The reasons cited for federal abstention in domestic relations cases include "the strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state and the problem of congested dockets in federal courts." *Crouch*, 566 F.2d at 487.

In reviewing the claims asserted, together with the reasoning that supports federal court abstention in domestic relations cases, this Court is of the opinion that this case was properly removed to federal court. The language of the complaint shows that, with the possible exception of the court's congested docket, none of the above considerations are relevant to this case. In fact, a thorough reading of plaintiff's

original petition has identified no claims related to domestic relations at all. Metzger's allegations are founded on perceived impropriety on the part of Judge West after the filing of a motion to recuse. The present suit is filed pursuant to § 1983 and is directly related to the contempt charges against his attorney. Based on the claims filed and the lack of strong state interest or competence in this suit, abstention under the domestic relation exception is inappropriate. *Ankenbrandt v. Richards*, -- U.S. --, 112 S.Ct. 2206 (1992); *Erspan v. Badgett*, 647 F.2d 550, 553 (5th Cir. 1981), cert. denied, 455 U.S. 945 (1982); *Crouch*, 566 F.2d at 487.

2. Law of the Case Doctrine

Metzger also asserts that this case must be remanded to state court based on a previous decision in which Judge Black abstained from exercising federal jurisdiction. Metzger contends that Judge Black's ruling is now the "law of the case" binding on all subsequent proceedings. Metzger is mistaken.

The law of the case doctrine provides:

> The decision of a legal issue by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case at both the trial and appellate levels unless the evidence at a subsequent trial was substantially different, the controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.

DFW Metro Line Services v. Southwestern Bell Telephone. Corp., 988 F.2d 601, 604 (5th Cir. 1993) (footnote omitted, emphasis supplied) (quoting *Reid v. Rolling Fork Pub. Util. Dist.*, 979 F.2d 1084, 1086 (5th Cir.1992) (quoting *Schexnider v. McDermott Int'l Inc.*, 868 F.2d 717, 718-19 (5th Cir.1989))).

First, although Metzger instituted this action in state court under Cause No. 67,944, *In the Matter of the Marriage of Mark A. Metzger and Judy Metzger and in the Interest of Mark A. Metzger III Russell Lawrence Metzger and Jean Danielle Metzger. Minor Children*, the same number as his divorce proceeding, this suit is predicated on the new issue of alleged violations of Metzger's civil rights by parties who have had no connection to the custody proceedings formerly pending before Judge West. Second, the previous decision was not from an appellate court and thus the strictures of the doctrine do not apply. Third, even assuming, arguendo, that Judge Black's decision to abstain due to the domestic relations exception doctrine could preclude this court from exercising jurisdiction, an exception to the "law of the case" exists since Judge Black's decision was made prior to the Supreme Court's ruling in *Ankenbrandt*. In *Ankenbrandt* the Court ruled that a federal district court may not abstain under the doctrine of domestic relations when the complaint does not "request the District Court to issue a divorce, alimony, or child custody decree". *Ankenbrandt*, -- U.S. at --, 112 S.Ct. at 2216.

B. Motions to Dismiss

Fed. R. Civ. P. 12(b)(6) provides that a motion to "dismiss for failure to state a claim upon which relief can be granted" may be proffered to dismiss a claim. When a district court reviews the sufficiency of a complaint, before it receives any evidence either by affidavit or admission, its task is inevitably a limited one. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claim. Id. In considering a motion to dismiss under Rule 12(b)(6), the District Court should accept as true all wellpleaded facts in the complaint. *LaPorte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1255 (5th Cir. 1986); *Windor v. Then Tennessean,* 719 F.2d 155, 158 (6th Cir. 1983), cert. denied, 469 U.S. 826 (1984). Dismissal of a claim is improper "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957):

Huqhs v. Rowe, 449 U.S. 5, 10 (1980); *Kaiser Aluminum & Chem Sales Inc. v. Avondale Shipyards Inc.*, 677 F.2d 1045. 1050 (5th Cir. 1982), cert. denied, 459 U.S. 1105 (1984).

Therefore, in challenging the sufficiency of the complaint under Rule 12 (b)(6), the defendants bear the burden of proving that under no interpretation of the facts set forth in the complain can the plaintiffs succeed. *Conley* at 45-46. Each of the defendants' motion to dismiss are discussed separately.

1. Standing

Metzger's primary complaint is that Judge West signed a show cause order to allow contempt proceedings to go forward when he lacked the jurisdiction to do so. Metzger also contends that Judge West and the Fulbright defendants had ex-parte communications with respect to the contempt proceedings. Metzger contends that "LOCKE's actions have polluted the integrity of the official process of the Court in an effort to deprive L.T. Bradt of access to a true and accurate Statement of Facts on which his guilt or innocence depends." Pl.'s original Petition at pp. 11-12. "[T]he Defendants . . . have acted to suborn the public and lawful processes of the state district court . . . [and] [f]urthermore . . . these Defendants acted in a clear conspiracy to obtain an unlawful conviction and incarceration of Plaintiff's counsel, L.T. Bradt, and thereby deprive Plaintiff, Mark A. Metzger, of effective assistance of counsel . . . ." Id. at 12. Metzger lacks standing to assert his claims against the defendants. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). All of Metzger's allegations stem from the contempt proceeding against Bradt. To have standing the claimant must have personally suffered actual or threatened injury as a result of the constitutional violation. Id.; *Warth V. Seldin*, 422 U.S. 490, 499 (1975). Metzger has no standing to assert the rights of someone not involved in this suit; namely Bradt.

The assertion that Metzger has been personally deprived of ef-

fective assistance of counsel due to the defendants alleged acts is conclusory. Conclusory allegations alone are not enough to state a § 1983 claim. *Brinkmann v. Johnston*, 793 F.2d 111, 113 (5th Cir. 1986); *Hale v. Harney*, 786 F.2d 688, 690 (5th Cir. 1986). Metzger offers no account of such a deprivation. Moreover, such a claim is specious given the fact that the proceeding was civil in nature and that the activities complained of could not have tainted the proceedings because they allegedly did not occur until after the directed verdict. Therefore, the defendants could not have prejudiced the proceeding. Furthermore, Metzger admits that he is currently pursuing an appeal of the directed verdict.

Metzger does not have standing to pursue claims against the remaining defendants for the claims he has alleged.

2. Judicial Immunity

Judges are absolutely immune from liability for judicial acts unless they are performed in the clear absence of jurisdiction. *Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir.), cert. denied, 492 U.S. 921 (1989). The magnitude of the error or mendacity of the acts is irrelevant. Id.; *Young v. Biggers,* 938 F.2d 565, 569 n.5 (5th Cir. 1991).

Judge West has absolute immunity from civil damage suits for his judicial acts. "A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." *Stump v. Sparkman*, 435 U.S. 349, 359 (1978). "Judges ... are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." Id. at 355-356 (quoting *Bradley v. Fisher*, 80 U.S. 335, 13 Wall. 335, 347 (1872)).

"[T]he factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, i. e., whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. at 362. Metzger alleges that Judge West signed a show cause order in

violation of a procedural rule causing him harm. Judge West was functioning within the scope of his judicial office. He is absolutely immune from suit. Id.

3. Prosecutorial Immunity

Defendant Delmore is an assistant district attorney in and for Harris County, Texas. As such, Delmore has absolute prosecutorial immunity from suits for damages for any conduct within the scope of his prosecutorial function. *Brummett v. Camble*, 946 F.2d 1178, 1181 (5th Cir. 1991), cert. denied, -- U.S. --, 112 S.Ct. 2323 (1992).

Metzger alleges that Delmore (1) in the process of prosecuting a criminal contempt action against Bradt engaged in an ex parte communication with a judge in violation of the Texas Disciplinary Rules of Professional Conduct, (2) somehow allowed his role as a public prosecutor to become "infected with," "dominated by," and "subservient to" private interest of other defendants in this suit, and (3) entered into a conspiracy with the other defendants to deprive Metzger of his civil rights.

All of the bad acts that Metzger alleges Delmore participated in are covered by Delmore's absolute prosecutorial immunity. To the extent that Metzger seeks to recover damages, his claim is barred by the doctrine of absolute prosecutorial immunity. *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *Burns v. Reed*, U.S. --, 111 S.Ct. 1934, 1942 (1991).

Prosecutors are absolutely immune from liability under § 1983 for their conduct in "initiating a prosecution and in presenting the State's case," because that conduct is "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976). See also *Burns v. Reed*, U.S. --, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991). *Brummett v. Camble*, 946 F.2d at 1181.

Metzger complains that, because Delmore committed bad acts, he went beyond the scope of his authority at trial and therefore he does not enjoy absolute immunity. Similar allegations were considered by the Fifth Circuit in *Brummett v. Camble*. There the Court determined that even where a prosecutor had an interest in the outcome of the prosecution he was still entitled to absolute immunity. 946 F.2d at 1181-82 ("immunity . . . protects acts of the judge or prosecutor regardless of their motives"). Allegations of reprehensible conduct do not defeat absolute prosecutorial immunity. See *Imbler v. Pachtman*, 424 U.S. at 413, 416, and 431. "While a prosecutor might lose absolute immunity when he acts with complete and clear absence of authority, such a condition does not occur when a prosecutor has an arguable basis of authority grounded in a statute." *Snell v. Tunnell*, 920 F.2d 673, 694 (10th Cir. 1990) (citing *Lerwill v. Joslin*, 712 F.2d 435, 440 (10th Cir. 1983)), cert. denied, -- U.S. --, 111 S.Ct. 1622 (1991). Clearly, Delmore had authority when arguably acting pursuant to state statute. Allegations of conspiracy do not "pierce the immunity extended to judges and prosecutors." *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986). Likewise, improper ex parte communications with a judge is still "intimately associated with the judicial phase of the criminal process" and does not place the prosecutor outside the scope of his prosecutorial immunity. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1991). Additionally, an alleged "[v]iolation of a disciplinary rule does not give rise to a private cause of action." *Adams v. Reagan*, 791 S.W.2d 284, 291 (Tex.App.Fort Worth 1990, no writ).

4. Fulbright Defendants

Metzger does not "allege the deprivation of a constitutionally protected interest" that caused him to suffer an injury. *Magnuson v. City of Hickory Hills*, 730 F.Supp. 1439, 1443 (N.D.Ill. 1990), aff'd, 933 F.2d 562 (7th Cir. 1991). Dismissal of this claim is proper because "it appears beyond a doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957): *Huqhs v. Rowe*, 449 U.S. 5, 10 (1980); *Kaiser Aluminum & Chem Sales. Inc. v. Avondale Shipyards*,

Inc., 677 F.2d 1045, 1050 (5th Cir. 1982), cert. denied, 459 U.S. 1105 (1984). Metzger's case was fully adjudicated before these claims arose. Currently, the verdict is on appeal. These facts do not state a claim for a denial of due process.

C. Injunctive Relief

To be entitled to equitable relief a claimant must allege and prove that he lacks an adequate remedy at law. *Baldwin Metals Co. v. Donovan*, 642 F.2d 768, 775 (5th cir. 1981), cert. denied, 454 U.S. 893 (1981). The two cases in which Metzger alleges improper conduct are still pending final resolution. All issues in dispute can be raised in the courts in which those actions are pending.

Equitable relief requires real and immediate direct injury. A claimant must show he has sustained direct injury "as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical" to demonstrate standing for injunctive relief. *Johnson v. Moore*, 958 F.2d 92, 95 (5th Cir. 1992) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Metzger has failed in this regard.

D. Attorney's Fees

Judge West, Mr. Delmore and the Fulbright defendants have requested that the Court award them attorney's fees and costs pursuant to 42 U.S.C. § 1988 for having to defend a groundless suit.

The parties seeking attorney's fees in this case are defendants. *United States v. State of Mississippi*, 921 F.2d 604, 609 (5th Cir. 1991) ("the first step in determining whether attorney's fees may properly be awarded is to identify the party seeking the fees as plaintiff or defendant") (citing *Coats v. Pierre*, 890 F.2d 728 (5th Cir. 1989), cert. denied, 498 U.S. 821 (1990)) .

[P]revailing defendants are entitled to attorney

> fees only when a plaintiff's underlying claim is frivolous, unreasonable, or groundless. See *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 93 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). We review frivolity by asking whether the case was so lacking in merit that it was groundless, rather than whether the claim was ultimately successful. See *Jones v. Texas Tech University*, 656 F.2d 1137, 1145 (5th Cir. 1981); see also *Plemer v. ParsonsGilbane*, 713 F.2d 1127 (5th Cir. 1983). The factors important to frivolity determinations are (1) whether plaintiff established a prima facie case, (2) whether the defendant offered to settle, and (3) whether the district court dismissed the case or held a full-blown trial. *EEOC v. Kimbrough Inv. Co.*, 703 F.2d 98, 103 (5th cir. 1983).

United States v. State of Mississippi, 921 F.2d at 609.

> "Implicit in [an award of fees] is the premise that plaintiff knew or should have known the legal or evidentiary deficiencies of his claim." *Brown v. Borough of Chambersburg*, 903 F.2d 274, 277 (3rd Cir. 1990) (citing cases) (ultimately finding that plaintiff's excessive force and deliberate indifference claims were frivolous). The plaintiff's claims against Judge West and Delmore were frivolous, unreasonable, and groundless. Judge West and Delmore are entitled to attorney's fees. See *Hamilton v. Daley*, 777 F.2d 1207, 1213 (5th Cir. 1985); *Dyson v. Sposeep*, 637 F.Supp. 616, 623 (N.D.Ind. 1986) (dealing with § 1988 and Rule 11).

III. CONCLUSION

This Court, having considered all other contentions presented concludes, for the reasons set forth above, that Metzger's Motion to Remand will be denied, Judge West's, Delmore's and the Fulbright defendant's motions to dismiss will be granted, and that Judge West and Delmore are entitled to attorney's fees.

SIGNED at Houston, Texas, this 31 day of AUGUST 1993.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Writ of Mandamus and Writ of Prohibition conditionally granted and Opinion filed October 16, 1992.

In The Court of Appeals For The First District of Texas

NO. 01-92-00987-CV

MARK METZGER, L. T. BRADT, AND JOE A. IZEN,
Relators

V.

THE HONORABLE SOLOMON CASSEB, JR. AND THE HONORABLE DAVID WEST, JUDGE OF THE 269TH DISTRICT COURT OF HARRIS COUNTY, TEXAS,
Respondents

Original Proceeding on Petition for Writ of Mandamus and Petition for Writ of Prohibition

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OPINION

Relators, Mark Metzger, L. T. Bradt, and Joe A. Izen, petition this Court for writ of mandamus and writ of prohibition to compel respondent, the Honorable Solomon Casseb, Jr., to hear their motion to recuse respondent, the Honorable David West, and in the interim, prohibit Judge West from taking any action relating to post-judgment proceedings.

On May 21, 1992, Judge West, after granting a motion for directed verdict in favor of the defendants in the underlying lawsuit, signed a final judgment, which is now before this Court on appeal. The judgment awarded monetary sanctions of $994,000 against relators and in favor of defendants below, which Judge West levied pursuant to Tex. R. Civ. P. 13. On June 16, 1992, relators filed a motion for new trial and motion to recuse Judge West from ruling on the motion for new trial and any further proceedings in the case. Judge West refused to recuse himself, and the motion to recuse was referred to Judge Casseb by the regional presiding judge of the second administrative district, Honorable Thomas Stovall.

Relators assert in their petition for writ of mandamus that the motion for new trial has been overruled by operation of law and do not request affirmative relief with regard thereto.

Judge Casseb denied the motion to recuse on the ground that he did not have jurisdiction because the appeal had been perfected in the underlying case.

Defendants have filed post-judgment discovery requests in the underlying cause, to which relators have objected. Relators request in their petition for writ of mandamus that Judge West be ordered to take no further action in this cause until the motion for recuse is heard. They further urge that Judge Casseb erred by ruling that he did not have jurisdiction to hear the motion for recusal. We agree.

A writ of mandamus will issue to correct trial court actions when there has been a clear abuse of discretion. *Ayres v. Canales*, 790 S.W.2d 554, 556 (Tex. 1990). Under Tex. R. Civ. P. 621a, trial courts have jurisdiction to rule on post-judgment discovery matters similar to the authority they have in pretrial matters. *Arndt v. Farris*, 633 S.W.2d 497, 499 (Tex. 1982). We hold that this includes the authority to rule on motion to recuse arisising [sic] during post-judgment proceedings.

Accordingly, we hold Judge Casseb abused his discretion when he denied, on the ground of lack of jurisdiction, relators' motion to recuse Judge West from any further proceedings in the case.

We ORDER the following relief:

(1) Judge West shall make no further orders and shall take no further action in the case until the motion to recuse is ruled on, "except for good cause stated in the order in which further action is taken," as provided in Tex. R. Civ. P. 18a(d).

(2) Judge Casseb's September 28, 1992 order denying relator's motion to recuse for lack of jurisdiction is vacated and set aside. Judge Casseb or another judge assigned by Judge Stovall shall hold a hearing on relator's motion to recuse, and rule on it.

See *Pollock v. Dowell*, 583 S.W.2d 886, 887 (Tex. Civ. App.—Dallas, 1979, orig. proceeding) (a court of appeals may issue a writ of mandamus to correct an order of the trial court refusing to take jurisdiction of a claim if that refusal was based on an erroneous theory of law), citing *Fulton v Finch*, 346 S.W.2d 823 (Tex. 1961).

We are confident Judge West and Judge Casseb will carry out the above orders. The writs of mandamus and prohibition will issue only if they do not.

Sam Bass, Justice

Justices Cohen and Dunn also participating.

Publish. Tex. R. App. P. 90
Opinion filed October 16, 1992
True Copy Attest:

Kathryn Cox
Clerk of Court

APPENDIX E

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 269TH JUDICIAL DISTRICT

MARK METZGER,
Plaintiff,

VS.

HARRIS COUNTY, TEXAS, JUDY SEBEK, EARLE LILLY, PIRO & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLEGE OF MEDICINE, ERNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDO LOHNER, ANN M. HODGES, and JOEL A. NASS,
Defendants.
269TH JUDICIAL DISTRICT

The record reveals that the above styled and numbered cause was called for trial on March 31, 1992 and there after proceeded in trial until May 15, 1992.

Prior to commencing voir dire, and the selection of the jury, an examination of the exhibits proposed by the parties, to be offered for admission in evidence, were marked. Some of them were ruled upon by the Court for admission into evidence without objection. One such exhibit was Baylor Exhibit No. 1 which contained a copy of the polygraph test made the basis of this contempt proceeding. This exhibit was admitted into evidence for all purposes, by the Court, without objection.

The evidence shows that a pleading styled "Defendants' Joint Motion in Limine" was filed on March 30, 1992 containing XXXIII matters including a paragraph numbered XVI G. That paragraph refer-

enced the results of a lie detector test and requested that it be excluded from the trial of the case.

The evidence also shows an exhibit styled "Order on Defendants' Joint Motion in Limine" signed by Judge West on April 2, 1992 reflecting "XVI GRANTED __X__."

The trial, with the jury seated, commenced and thereafter on April 10, 1992 the respondent, L. T. Bradt, elicited testimony from witness Marie Munier with reference to the polygraph test and also wrote a reference to the results of that test on a poster in view of the jury.

On April 23, 1992, counsel who offered, and had admitted into evidence without objection, Baylor Exhibit No. 1 moved the Court to withdraw from that exhibit the pages reflecting the result of the polygraph test in question.

A judgment was signed on the 21st day of May, 1992.

The Respondent, L T. Bradt, filed a motion for new trial. Thereafter, he filed a motion requesting that Judge David West recuse himself.

On July 1, 1992, Judge West, in a signed order, declined to recuse himself and requested the Presiding Judge of the 2nd Administrative Judicial Region of Texas to assign another judge to hear the motion for recusal.

On August 18, 1992 Judge West signed an order reflecting the Respondent, L. T. Bradt, guilty of contempt and assessed punishment as a $500.00 fine and 30 days confinement in the Harris County jail.

Respondent, L. T. Bradt, then moved for the determination of guilt or innocence of the contempt of court by a judge other than the offended court in accordance with Section 21.002 of the Texas Gov-

ernment Code.

On September 15, 1992 Judge Thomas J. Stovall, Jr. the Presiding judge of the 2nd Administrative Judicial Region of Texas assigned Arthur C. Lesher, Jr., a Senior District Judge, to determine the guilt or innocence of Respondent, L. T. Bradt.

Thereafter, on November 30, 1992 came on for hearing the matter assigned to Arthur C. Lesher, Jr. All parties were present and announced ready.

The State's attorney announced to the Court that the State of Texas was abandoning the allegations contained on page one of the Show Cause Order signed on August 18, 1992, to wit,

> "WHEREAS L. T. Bradt thereafter violated the order in limine during voir dire examination of the jury and his opening statement, by making reference to the plaintiff having submitted to a polygraph or 'lie detector' test...."

After hearing and examining the evidence introduced, the Court is of the opinion that the Respondent, L. T. Bradt, is entitled to a dismissal of the contempt charges made against him, and it is so ordered.

Signed this 4th day of December, 1992.

_____

ARTHUR C. LESHER, JR.
SENIOR DISTRICT JUDGE PRESIDING

APPENDIX F

COURT OF APPEALS
FIRST DISTRICT OF TEXAS

COPY OF CORRECTED JUDGMENT

MARK METZGER, L. T. BRADT, AND JOE ALFRED IZEN, JR.,
Appellants,

NO. 01-92-00912-CV
V.
JUDY SEBEK, EARLE LILLY, PIRO & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLEGE OF MEDICINE, ERNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDO LOHNER, ANN M. HODGES, and JOEL A. NASS,
Appellees.

Appeal from the 269th District Court of District Court of Harris County, Texas (Tr. Ct. No. 90-53676) Opinion delivered by Justice Price, Justices Duggan and Hutson-Dunn also sitting.

This Court's former judgment of September 29, 1994, of record in Minute Book 29, Page 1738, be, and the same hereby is, VACATED, SET ASIDE, AND ANNULLED. This Corrected Judgment is issued in its place.

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on May 21, 1992. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in the judgment regarding the granting of a directed verdict in favor of all appellees on all of appellant MARK METZGER'S causes of action It is therefore CONSIDERED ADJUDGED, AND ORDERED that this portion of the judgment of the court below be affirmed.

It is further the opinion of this Court that there was error in the judgment regarding the imposition of sanctions against appellant L. T. BRADT. It is therefore CONSIDERED, ADJUDGED, AND ORDERED that this portion of the judgment of the court below be severed, and as severed, be reversed and remanded or further proceedings in accordance with the instructions set out in the opinion of this Court.

It is further the opinion of this Court that there was error in the judgment regarding the imposition of sanctions against appellant JOE ALFRED IZEN, JR. It is therefore CONSIDERED, ADJUDGED, AND ORDERED that this portion of the judgment of the court below be severed, and as severed, be reversed and that judgment be rendered that no sanctions be imposed against him.

It is further the opinion of this Court that there was no error in the judgment to the extent that it imposes sanctions against appellant MARK METZGER, but that there was error in the judgment regarding the amount of those sanctions. It is therefore CONSIDERED, ADJUDGED, AND ORDERED that the portion of the judgment imposing sanctions against appellant MARK METZGER be affirmed but that the portion of the judgment regarding the amount of the sanctions be severed, and as severed, be reversed and remanded for further proceedings in accordance with the instructions set out in the opinion of this Court.

It is further the opinion of this Court that this Court has no jurisdiction to hear appellant L.T. BRADT'S complaint regarding the decisions made in the contempt proceedings against him. It is therefore CONSIDERED, ADJUDGED AND ORDERED that this part of the appeal herein be, and the same hereby is, dismissed for want of jurisdiction.

It is further ORDERED that the appellants, MARK METZGER, AND L.T. BRADT, and their surety, UNIVERSAL SURETY OF

AMERICA, jointly and severally, pay one-half of the costs incurred by reason of this appeal and that at the appellees, JUDY SEBEK, EARLE LILLY, PIRO & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLEGE OF MEDICINE, ERNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDO LOHNER, ANN M. HODGES, and JOEL A. NASS, jointly and severally, pay the remaining one-half of the costs incurred by reason of this appeal.

It is further ORDERED that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Duggan, Hutson-Dunn, and Price

Judgment entered November 10, 1994